Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies Mobilitie, LLC Petition for Declaratory Ruling	WT Docket No. 16-421

Comments of ExteNet Systems, Inc.

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SUMMARY

Despite the deregulatory and procompetitive intent of the Telecommunications Act of 1996 ("1996 Act") and the Commission's actions seeking to promote the deployment of advanced telecommunications networks, ExteNet regularly encounters local governments that impose barriers to entry that prohibit or effectively prohibit ExteNet's provision of telecommunications services.

Specifically, ExteNet is frequently subject to municipal delay and inconsistent, burdensome, discretionary, and arbitrary regulatory regimes for use of public rights of way for the deployment of distributed network systems ("DNS"), including small cell and DAS infrastructure. For example, many local governments require DNS applications to go through a costly and time consuming formal zoning process, charge excessive fees, impose discriminatory requirements as compared to other entities deploying facilities on poles in the public rights of way, or simply have no process at all – each of which are a significant impediment to investment and deployment.

ExteNet urges the Commission to issue a declaratory ruling that clarifies the permissible extent of the local regulation of, and permissible fees for, DNS infrastructure to be deployed within public rights of way. Specifically, ExteNet asks that the Commission declare that:

- Section 253 of the Communications Act of 1934, as amended, prohibits regulations imposed on DNS facilities that reserve to the local government unfettered discretion that exceed the narrow authority reserved to manage physical occupation of the public rights of way;

- Local permitting requirements for DNS facilities that are not applied to other communications or utility users of the public rights of way constitute an effective prohibition on the provision of telecommunications services in violation of Section 253(a) and are not permissible under Section 253(c);

- Unreasonable delay of the local permitting process constitutes an effective prohibition of service under Section 253(a), and that it is a prohibition of service for a locality to

take longer than 60 days to act on a request for permission to install DNS facilities in existing public rights of way;

- Local government fees for the use of the public rights of way by DNS facilities, including fiber optic lines, must be publicly disclosed in advance, may not be greater than fees charged to other users of the public rights of way, and must not exceed the direct costs incurred by the local government in managing the provider's use of the public rights of way; and

- Both Section 253 and Section 332(c)(7)(B) govern deployment of DNS facilities, and that a the analysis of an effective prohibition of service under Section 253 is not the same as the judicially-crafted standard currently applied in Section 332 cases.

A declaratory ruling clarifying the correct scope of local authority will expedite the deployment of wireless broadband infrastructure, reduce the costs of deployment, and eliminate the skewing of competition that results from current local obstacles to deployment. Given the Commission's recent and repeated recognition that deployment of wireless networks and services is a critical element of the Country's present and future economy, it should take this opportunity to issue a declaratory ruling that reinvigorate the meaning and purpose of Section 253 and, in so doing, further fulfill the Commission's mandate to promote the rapid deployment of broadband.

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I. INTRODUCTION

ExteNet Systems, Inc. ("ExteNet") welcomes the opportunity to comment on the potential for the Commission to issue a declaratory ruling that will streamline the deployment of distributed network systems ("DNS"), including small cell and DAS infrastructure. ExteNet designs, builds, owns and operates DNS for use by wireless carriers and property owners in key markets throughout the United States. Using DAS, remote radio heads, small cells, Wi-Fi, software-defined network based evolved packet core and other technologies, ExteNet deploys solutions to enhance wireless service and network performance across both outdoor and indoor environments. ExteNet's primary markets include outdoor DNS in a variety of densely occupied urban and suburban environments as well as selected rural areas, and various indoor properties, including sports and entertainment venues, hotels and convention centers, commercial office buildings, healthcare facilities and transit systems.

ExteNet is at the forefront of the deployment of DNS. Since its founding in 2002, ExteNet has been working directly with state and local officials to obtain approval for the deployment of hundreds of DNS and thousands of antenna locations through which it provides telecommunications services to wireless carriers. As a result, ExteNet has unparalleled experience with the issues raised in this proceeding. Indeed, the questions concerning fiber and antenna deployment raised in this proceeding are at the heart of ExteNet's daily activities.

A. What Deployments Are Covered by This Proceeding

The Commission's *Public Notice* in this proceeding recognizes that small cell facilities "are smaller and less obtrusive than traditional cell towers and antennas."[1] It likewise

[1] Public Notice, Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies and Mobilitie, LLC Petition for Declaratory Ruling ("*Public Notice*"), 31 FCC Rcd. 13360, 13360 (2016).

acknowledges that small cell facilities "must be deployed more densely – *i.e.*, in many more locations – to function effectively."[2] Accordingly, it is critical to define what constitutes a DNS deployment for purposes of these comments. Unless otherwise stated, ExteNet uses the term "DNS" to include both individual nodes in a DAS network, stand-alone small cell installations that are not part of a DAS network, and other similar deployments using alternate technologies that satisfy the criteria described below.

With respect to the specific equipment that is deployed in a DNS, ExteNet will use the volumetric definition contained in the Commission's First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas[3] as well as in legislation recently passed in Ohio and Virginia, which define a DNS as a facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the volumetric calculation: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services. The term "DNS" also would be limited to installations on poles or other support structures that are located in the public right

[2] *Id.*

[3] First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Public Notice, Wireless Telecommunications Bureau Announces Execution of First Amendment to Nationwide Programmatic Agreement for Collocation of Wireless Antennas, 31 FCC Rcd. 8824, 8829 (2016).

of way and that are no greater than 50 feet above ground level or ten feet in height above the tallest existing utility pole within 500 feet of the installation, whichever is greater.[4]

B. The Commission Should Issue a Declaratory Ruling

Despite the deregulatory and procompetitive intent of the Telecommunications Act of 1996 ("1996 Act") and the Commission's actions seeking to promote the deployment of advanced telecommunications networks, ExteNet still far too often encounters considerable trouble deploying its DNS in a timely, economic, and reasonable manner. Local governments regularly impose barriers to entry that interfere with ExteNet's provision of telecommunications services, and in turn, with the ability of ExteNet's wireless carrier customers to satisfy consumer demand for mobile broadband. ExteNet also emphasizes that despite the focus on the wireless equipment involved in DNS, it still frequently encounters delays and other barriers to entry with the fiber optic portions of its DNS deployments – solely because they are related to a wireless element.

ExteNet urges the Commission to issue a declaratory ruling that clarifies the permissible extent of the local regulation of, and permissible fees for, DNS infrastructure to be installed within public rights of way. Specifically, ExteNet asks that the Commission declare that:

- Section 253 of the Communications Act of 1934, as amended (the "Act") prohibits regulations imposed on DNS facilities that reserve to the local government unfettered discretion and that exceed the narrow authority reserved to manage physical occupation of the public rights of way;

- Local permitting requirements for DNS facilities that are not applied to other communications or utility users of the public rights of way constitute an effective prohibition on the provision of telecommunications services in violation of Section 253(a) and are not permissible under Section 253(c);

- Unreasonable delay of the local permitting process constitutes an effective prohibition of service under Section 253(a), and that it is a prohibition of service for a locality to

[4] These height limitations are drawn from those adopted in the Ohio statute.

take longer than 60 days to act on a request for permission to install DNS facilities in existing public rights of way;

- Local government fees for the use of the public rights of way by DNS facilities, including fiber optic lines, must be publicly disclosed in advance, may not be greater than fees charged to other users of the public rights of way, and must not exceed the direct costs incurred by the local government in managing the provider's use of the public rights of way; and

- Both Section 253 and Section 332(c)(7)(B) govern deployment of DNS facilities, and that the analysis of an effective prohibition of service under Section 253 is not the same as the judicially-crafted standard currently applied in Section 332 cases.

The Commission has authority to issue a declaratory ruling interpreting Sections 253 and 332, and issuing such a declaratory ruling is the appropriate vehicle for the Commission to eliminate unnecessary regulation and promote the deployment of advanced telecommunications services. As noted in the *Public Notice*, the Commission has previously used the mechanism of a declaratory ruling to resolve conflicts in the interpretation of the Communications Act.[5]

A declaratory ruling confirming the limited scope of local authority will expedite the deployment of wireless broadband infrastructure, reduce the costs of deployment, and eliminate the skewing of competition that results from current local obstacles to deployment. Issuing a declaratory ruling also will directly advance Congress' goal in enacting the 1996 Act, "for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers," rather than "local governments . . . creating an unnecessary 'third tier' of regulation that extends far beyond the statutorily protected interests in managing the public rights-of-way."[6]

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[5] *Public Notice*, 31 FCC Rcd. at 13365-66 (citing *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14020 ¶ 67 (2009), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013)).

[6] *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21440-41 ¶¶ 102, 105 (1997) ("*TCI Cablevision*") (internal quotation marks and citation omitted).

II. THE CONCERNS IDENTIFIED BY THE COMMISSION IN 2009 AND 2014 PERSIST AND ARE NEGATIVELY IMPACTING DEPLOYMENT

In the *Public Notice*, the Commission asks whether the concerns that motivated its 2009 and 2014 Orders adopting limitations on local oversight of broadband deployments are still a problem. Unfortunately, in ExteNet's experience, the twin problems of municipal delay and regulatory overreach persist. ExteNet continues to encounter lengthy permitting delays in many communities, with a large number of its applications taking over six months, and many even a year, two years, or more. Moreover, ExteNet has encountered numerous local governments that are imposing ever more burdensome, discretionary, and arbitrary regulatory regimes for use of the public rights of way. ExteNet has faced untenable multi-year delays where a city will change its requirements multiple times, with new requirements imposed each time ExteNet has finally complied with the previously articulated requirements.

A. ExteNet Continues To Experience Sizeable Delay In Deploying DNS In The Public Right Of Way

In the *Public Notice*, the Commission requested concrete data regarding obstacles and impediments to deployment. To respond to the Commission's request, ExteNet reviewed its deployment experiences for 100 separate DNS networks initiated in 2015 or 2016. Of those 100 networks, the permitting process in 30% took between 6 and 12 months and for an additional 17%, the permitting process extended over 12 months, with some taking more than two years.

Even assuming the longest possible "reasonable" time under the Commission's *Shot Clock Order* (150 days),[7] in at least 47 communities ExteNet could have filed a complaint for a

[7] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 FCC Rcd. 13994 (2009) ("*Shot Clock Order*"). In the *2014 Wireless Infrastructure Order*, the Commission clarified that a DNS deployment on a new pole would trigger the 150-day shot clock, and thus an attachment to an existing utility pole should be subject to the 90-day shot clock. *See Acceleration of Broadband*

shot clock violation. In other words, nearly half of all communities in the past two years have failed to act within a reasonable period of time, even using the longest time defined by the Commission. And that is a conservative estimate. It assumes the 150-day timeframe for DNS facilities where a new pole is installed. Most of ExteNet's applications in those communities, however, were collocations to existing utility poles and did not involve installation of a new pole. Thus, the number of communities violating the shot clock is actually higher. These statistics do not even reflect the fact that ExteNet has consciously avoided deployment in certain communities that are known to have time-consuming, burdensome requirements.

B. An Inconsistent Patchwork Of Local Processes Effectively Prohibit Deployment

A significant cause of delay and barriers to entry is the inconsistent patchwork of local requirements. The DNS networks that ExteNet deploys are not designed based on local government boundaries and frequently are regional, covering multiple local jurisdictions. However, each local government that ExteNet approaches has its own set of rules and processes and potentially even more varied reactions to DNS facilities. This lack of consistency and clarity, alone, is a significant barrier to deployment, particularly as it impacts inherently regional or even statewide networks. As a result, ExteNet has little or no certainty regarding each community's process, and cannot determine in advance how long it will take to deploy, what the fees will be, or if the same equipment will be permitted in one community compared to its neighbors. ExteNet regularly encounters situations where local governments seek to demand equipment changes based on their own parochial desires. Every community requires ExteNet to navigate unpredictable and often costly and time-consuming local processes on a project-by-project basis.

Deployment by Improving Wireless Facilities Siting Policies, 29 FCC Rcd. 12865, 12974 ¶ 272 (2014) ("*2014 Wireless Infrastructure Order*") (noting that "DAS and small-cell deployments that involve installation of new poles will trigger the 150-day time period for new construction").

ExteNet cannot change its network for each location or community. That uncertainty and inconsistency is therefore a significant impediment to investment and deployment. As the Commission recognized many years ago, the "patchwork quilt" of local regulations itself is a barrier to entry that conflicts with the purpose and language of the 1996 Act.[8]

There are various reasons and situations that have led to the problems and delays faced by ExteNet; the following categorizes the most common issues:

1. Local Governments Apply Traditional Tower Zoning To DNS In The Public Rights Of Way

In the *Public Notice*, the Commission asks whether local governments are seeking to impose on DNS facilities the same process and requirements imposed on traditional macro towers installed on private property. ExteNet has found this to be a frequent occurrence. In 2015 and 2016, alone, 41 percent of the communities applied to by ExteNet demanded that ExteNet's applications be subject to some form of discretionary review, with 36 of the 41 communities requiring ExteNet to go through formal zoning. Many communities demand that any installation that involves an antenna, even in the public rights of way, must go through zoning.

Those zoning processes are lengthy, burdensome, and discretionary. It is extremely common for cities to require a "pre-application" meeting with staff before ExteNet can even submit its application. Once submitted, applications are often subject to multiple layers of review and public comment. Each layer of the process can take weeks or months, and at any juncture, a motivated member of the public or staff member can effectively stop the deployment.

The zoning applications themselves typically require ExteNet to produce and submit detailed, complex plans and materials. Cities, often at the urging of consultants, require detailed

[8] *TCI Cablevision*, 12 FCC Rcd. at 21440-42, ¶¶ 102-106.

engineering studies, information and photos of the surrounding area and proposed installation, information regarding all surrounding wireless facilities for distances up to a mile or more, and detailed radio frequency studies regarding the need for the installation. Applications are repeatedly rejected or returned for "missing" information or based on demands for yet more information. Applications will likely face at least one and frequently multiple public hearings. At those hearings, local residence can and do object and oppose the application, frequently on purely "not in my back yard" "NIMBY" grounds. Zoning codes almost always vest the local government with essentially unfettered discretion to deny the application for any number of reasons, including issues such as "compatibility" with the character of the area. Yet, those standards ignore the fact that the installation is in a public right of way that is already a corridor for utility use.

These are the same processes and standards as imposed on the installation of one-hundred-plus foot towers on private property, and to major property development projects.[9] However, countless requirements contained in traditional zoning codes are meaningless and simply impossible to meet in the public right of way context. For example, it is extremely common for zoning codes to require wireless facilities to be "set back" a certain distance from property lines. Yet, utility poles in public rights of way are only a few feet from property lines. There is no way to comply with the setback requirement because the requirement was drafted to apply to a 100+ foot tall tower on a private parcel of property. The cost of going through a zoning application process rather than the standard right of way permit process substantial. It is not unusual for a right of way permit process to cost only a few hundred dollars and take only a

[9] Utility poles and street lights, the infrastructure that ExteNet attaches to most commonly, are typically no more than 35-40 feet and 25-35 feet high, respectively.

few days or few weeks at most, while the zoning process in the same city could cost over $15,000 per node and take months.

2. Local Governments Discriminate Against DNS Facilities

In general, there is an extensive problem with discriminatory treatment of ExteNet's DNS facilities compared to other telecommunications providers, cable companies, or electric utilities deploying in the public rights of way. In 2015 and 2016, 49 percent of surveyed communities where ExteNet sought to deploy DNS facilities required ExteNet to follow a different process and be subject to different standards than the process and standards required of other entities deploying facilities on poles in the public rights of way. This discrimination exists even though the other users of the public rights of way often employ facilities that are the same size or larger than the facilities deployed by ExteNet. Another problem that ExteNet has encountered is communities that refuse to follow their own defined standard process for public rights of way permits that they impose on other right of way pole occupants. Seventeen percent of communities had a standard right of way permitting process but refused to allow ExteNet to proceed under it for installing DNS facilities at least in part because ExteNet was deploying an antenna.

3. Local Governments Sometimes Have No Process, Or Have No Clear Process

A related issue is the persistent delay and frustration triggered when local governments have no clear application process. In 43% of the communities ExteNet surveyed in 2015 and 2016, delay was caused by the local government having no clear process for how to apply for permission to install DNS facilities on poles in the public rights of way. Essentially, these communities simply make up the rules as they go, and they often do so with antipathy to the prospect of RF emitting devices in the public rights of way as a guiding philosophy. The lack of

a clearly defined process at the outset frequently contributes to lengthy processes as a community delays even considering applications until it decides on what it believes is the appropriate process.

Another common problem causing delay is local governments that demand that ExteNet enter into an "agreement" to occupy the public rights of way (whether called a franchise, license, access agreement, or some other name). Fifty-three percent of communities in 2015 and 2016 demanded such an agreement from ExteNet, but sixty percent of those local governments did not even have a form agreement to work from when ExteNet sought to use the public rights of way. Many of these communities allow other telecommunications providers and electric utilities to occupy the public rights of way without any such agreement.

4. Local Governments Charge Arbitrary Or Excessive Rights Of Way Fees

ExteNet has also encountered outrageous fee demands. A city in New York state required a $30,000 per year flat "administrative fee," plus a payment of $708 per node per year for each of ExteNet's nearly 60 nodes. A city in the midwest, required ExteNet to pay $15,000 per year for three DNS nodes. To ExteNet's knowledge, those communities do not charge fees for other telecommunications providers that occupy poles in the public right of way. Notably, in approximately 25% of the communities ExteNet surveyed from its 2015 and 2016 deployments, the local government required fees from ExteNet that were not required of other telecommunications providers who deploy equipment on poles in the rights of way. [10]

[10] Fee demands by departments of transportation (DOTs) in various states are also a significant problem. ExteNet has encountered a growing number of DOTs that are seeking to charge fees for each node in the state right of way at rates that would be charged for a traditional macro tower. For example, one DOT is demanding $24,000 per year for 1 new pole. That is more than the revenue from ExteNet's customers. In comparison, that same DOT charges the electric utility $0 for each of its poles in the right of way.

Although the *Public Notice* focused on the wireless elements of a DNS, ExteNet notes that it frequently encounters unreasonable fee demands related to the fiber optic lines that are part of a DNS deployment. Traditionally, fiber optic lines were comparatively easy to deploy because utilities have been deploying wires in the public rights of way for over one hundred years. More recently, however, this has changed, especially when the fiber deployment is associated with a wireless facility. ExteNet has encountered local governments that will demand fees for fiber optic lines that serve wireless equipment in a DNS that are unreasonable and discriminatory, solely because the fiber serves or is associated with wireless equipment. In acting to support the deployment of wireless components of a DNS, the Commission should assure that the related fiber is not subject to unreasonable fee demands.[11]

5. Examples Of Problematic Deployments

The concrete data regarding ExteNet's experiences in just the past two years demonstrate the need for Commission action. However, those raw numbers fail to convey how extreme the experience with certain jurisdictions can be.

a. A Two-Year Odyssey Of Delay And Changing Requirements

ExteNet began working with one city in the northeast in December 2012 to secure right of way access and pole attachment/replacement rights from the city for installation of a DNS.

[11] Another significant issue concerns the need for new poles. ExteNet generally seeks to deploy its DNS facilities using existing pole infrastructure because it appreciates that installing new poles is both costlier and more likely to raise objections from local government. Nonetheless, there are various circumstances beyond ExteNet's control. Often, the issue is driven by the utility pole owners. In one state where pole attachments are not within the FCC's jurisdiction, the dominant utility has simply refused to allow wireless attachments. In many other instances, although the utility does not explicitly prohibit wireless facilities, it will impose so many conditions and limitations that many individual poles are effectively unusable. As a result, ExteNet may be forced to propose to install its own pole. Sometimes, the need for new poles is driven by the local government itself. Essentially, there will be different opinions within the local government about whether existing poles or new poles are preferable, and ExteNet is caught in the middle, unable to deploy.

What followed was a two-year long odyssey, with the city changing the rules and its demands multiple times. Ultimately, ExteNet was forced to resort to the threat of litigation – even drafting a court complaint – before a resolution could be reached.

Prior to January 2013, ExteNet began working to develop a DNS in the city and discussed with city officials in the Information Systems ("DIS") and Public Works ("DPW") departments the process to approve new DNS installations. At that time, officials in DPW informed ExteNet that placement of antennas and accessory equipment on existing poles would not be allowed and that new poles, to be owned and maintained by ExteNet, would need to be approved. In those discussions, ExteNet also was advised it would need a telecommunications license from the DIS, as well as an encroachment permit and maintenance agreement.

In August 2013, the DIS directed ExteNet to submit plans for the proposed poles for its preliminary review. In the follow up discussions, however, the city began to express concern about setting a precedent that could result in the proliferation of new poles. It appeared that a disconnect was developing between the two city departments (DIS and DPW) over design, review, and approval process for the DNS.

In January 2014, *a year into the process*, everything changed. The city's newly elected mayor requested the resignation of all prior mayoral appointments and subsequently appointed a new director of DPW, a new director of the Department of Law ("DOL"), and a director of a newly-announced Department of Innovation & Performance ("DIP"), which eliminated and replaced the former DIS.

In late February 2014, and again in mid-March 2014, ExteNet met with DPW and the DOL in an effort to secure the city's final position on whether it would require new poles instead of collocation on existing poles. In other words, ***fourteen months into the process, ExteNet still***

did not know whether the city would allow attachment to existing poles, or demand ExteNet install new poles of its own. Indeed, in those meetings DPW changed positions again and indicated that ExteNet should propose new poles – a position that directly conflicted with the concerns expressed by the former DIS over the proliferation of new poles within the public rights of way. Concurrently, ExteNet worked with the Department of City Planning and the Public Art Division ("PAD") to address concerns regarding placement of new wireless nodes in the public rights of way.

With the introduction of yet more city departments, the changing rules continued. During the course of discussions with the PAD, the city returned to its concern over the proliferation of new poles and requested that ExteNet develop a different design for the new DNS installations. Working now with DPW and PAD, ExteNet proposed poles that would replace existing city-owned poles and which would be designed to look like the existing streetlight poles while capable of supporting the telecommunications equipment required for the operation of the DNS. DPW and PAD agreed upon the designs of the replica replacement poles. ExteNet was then instructed to submit an application to the city's Art Commission for its formal approval of the new streetlight pole designs. In addition, ExteNet was instructed to file its application for a telecommunications license with DIP. Accordingly, at the end of May 2014, ExteNet submitted its formal telecommunications license application on the proper form as provided by DIP, along with supporting documentation. To be clear, it took approximately seventeen months for the city to even allow ExteNet to file an "application" for what the city decided was the necessary license agreement.

In mid-June 2014, ExteNet submitted its application to the Art Commission for conceptual and final approval of the design of the replica streetlight poles for each of its DNS

installations. Shortly thereafter, a public meeting was held before the Art Commission at which time the details of the design application were discussed and ExteNet presented photo-simulations of the proposed pole replacements. At the meeting, the Art Commission made recommendations regarding modification of the replica streetlight pole design and tabled action on ExteNet's application pending submission of an amended application showing the recommended modified designs. ExteNet prepared revisions and submitted an amended application to the Art Commission, which was subsequently approved at a public meeting in late July 2014.

At the end of July 2014, ExteNet received confirmation from DPW that the replica streetlight poles would not have to undergo an encroachment process since the city would own the new replacement poles, but that ExteNet would need an "Acceptance and Maintenance Agreement" with the city. ExteNet was informed at that time that DPW would work with the DOL to execute this additional "Acceptance and Maintenance Agreement," and that ExteNet could proceed with pulling fiber permits and ordering poles as approved by the Art Commission. At the same time, ExteNet received bonding & drawing requirements from DPW and was told to check back in mid-August 2014 to learn where the city stood on the project. In late August 2014, ExteNet received a license number but no installation permits. DPW stated that no permits would be issued until the license agreement was approved.

In late September 2014 – nearly four months after submitting its application and 21 months into the process – ExteNet was informed that the reason the license agreement was taking so long was because another company was updating its license agreement and the DOL refused to process the two applications separately. In early October 2014, ExteNet began efforts to work with the other company to try to get both companies' agreements processed.

But again the City changed the rules and informed ExteNet that several more months of delay were coming. Specifically, in mid-October 2014 the city informed ExteNet that the city had decided that its code needed to be updated, but that it "may take a couple more months, to propose the amendments and prepare legislation for City Council's approval." The city's email asserted that "[r]ealistically it may take ***until January*** [2015] for Council to debate and approve the amendments." (Emphasis added.)

Accordingly, in early November 2014, ExteNet engaged counsel to draft a federal shot clock complaint against the city. While preparing to file the complaint, ExteNet's counsel subsequently sent a letter to the city's attorney seeking to resolve the matter without need for litigation. As a result, around Thanksgiving 2014, an agreement was reached whereby the city would grant permits and approvals by mid- to late December 2014 and the city attorney would revise the maintenance agreement, with the expectation that it be finalized and approved by the City Council before year end 2014. On December 29, 2014, the city council finally approved a "Municipal Pole Installation and Maintenance Agreement" to allow ExteNet to proceed with building the DNS and ending ExteNet's odyssey.

b. A Complex, Discretionary, Discriminatory Process

The following summarizes the permitting and attachment agreement issues with regard to wireless facility deployments in a large western city.[12]

In many parts of the city, the only above ground poles are transportation and light poles owned by the city. The city prohibits the installation of new, privately owned poles in those areas, and thus, to deploy DNS facilities in those areas, the only option is city-owned poles.

[12] ExteNet ultimately has been able to deploy facilities in this city despite the delays, barriers, and discrimination it has faced. However, that does not mean that the city's requirements and delays do not continue to materially inhibit ExteNet's ability to compete in a fair and balanced regulatory environment.

After years of negotiations, the city recently finally agreed to allow facilities on public rights of way poles and metal light poles. The fees required by the city for use of its poles are some of the most expensive in the country, costing more than $4,000 per year per pole.

Permits to install public right of way wireless facilities in this city can take six months to two years for issuance. The delays are systemic. To start, the city's Planning Department takes two to three months to review every application under the state's environmental statute prior to starting the regular individual site permitting process. This additional 2-3 month review is particularly egregious because the facilities are categorically exempt from the environmental statute.

After obtaining environmental approval, individual applications can be submitted, but the city throttles the number of permit application submittals to no more than ten per week per applicant. Recently, the city throttled this to *six* per week – bringing permitting to a near standstill. Moreover, many applications are rejected for arbitrary reasons, such as immaterial typos in the application, and each resubmittal counts toward the weekly limit.

Applications are reviewed by at least four city departments. The preliminary review usually takes two months before a Tentative Approval ("TA") issues. The TA must be publicly noticed, often incurring protests within the 20-day notice period. Protest hearings are then scheduled within a month, and a Final Determination ("FD") is rendered within a few weeks of the protest hearing. The FD allows a two-week appeal period that typically incurs a second hearing within three months of appeal. The decision-making body rarely decides on an item upon first impression. As a result, it is common to have to present applications two or three times before a decision issues.

Separately, the city's Planning Department review relies upon subjective standards, including whether there is an "obstruction of public view" – often raised for the first time only after protests or appeals. The subjective planning review and never-ending hearings result in a long and unpredictable process that can be blocked by purely political, subjective objections.

All this culminates in an approval with burdensome and expensive conditions. For example, the city requires a tree planting in the public right of way, or an "in lieu of fee" in the amount of $2,250. Post-installation radio frequency emissions testing is required every two years for the life of the installation. Also, every six months a five-year plan must be filed with the city detailing all the applicant's existing facilities. Failure to comply with any of these requirements can cause the city to stop processing applications.

The city also is very restrictive as to what equipment is allowed to be installed on its poles and even on utility poles not owned by the city. The city has not allowed anything more than two remote radio units and an approximately two-foot long canister antenna. On utility poles, the city has also allowed a small power disconnect switch box, which is required by the electric company. Incredibly, when ExteNet installed a disconnect switch *that was volumetrically smaller* but was two inches taller than the one permitted, the city delayed ExteNet's permits and threatened to stop permitting all ExteNet facilities until the issue was resolved.

III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING CONFIRMING THE WAYS IN WHICH SECTIONS 253 AND 332 OF THE ACT PROTECT CONSTRUCTION OF DNS FACILITIES FROM LOCAL REGULATIONS

ExteNet's experience with local regulation of its efforts to install DNS facilities is that many local governments act as gatekeepers, requiring zoning and other extensive processes for every installation, going far beyond activities necessary to manage their public rights of way. In

those communities and others, the 1996 Act has not worked as Congress intended to create "'a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services ... by opening all telecommunications markets to competition.'"[13] The Commission should confirm that Section 253 of the Act is intended to preempt barriers to entry in the intensely local markets served by DNS networks, and clarify that comprehensive zoning and other time consuming, discretionary local processes unrelated to management of the public rights of way are preempted by Section 253.

Specifically, the Commission should issue a declaratory ruling clarifying that Section 253(a) is not limited only to outright explicit prohibitions on service, but is violated by any state or local requirements that: "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" or impose requirements that in combination or as a whole impede the provision of any telecommunications service, including but not limited to requirements that leave local governments unfettered discretion over applications, and requirements imposing lengthy or onerous application processes.[14] In so doing, the Commission should clarify that to violate Section 253(a) a local government requirement need not be "insurmountable" or make it completely impossible to provide telecommunications services.[15]

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[13] *Public Utility Commission of Texas*, 13 FCC Rcd. 3460, 3461 ¶ 1 (1997) ("*Texas Preemption Order*") (quoting S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.)).

[14] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (1996 Act "fundamentally restructures local telephone markets. States may no longer enforce laws that ***impede*** competition. . . ." (emphasis added)); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001), *overruled by Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

[15] *See, e.g., RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

The Commission should declare that imposition of regulations and requirements on DNS deployments that are not imposed on other telecommunications equipment installed on poles in the public rights of way is a barrier to entry, and that such imposition of requirements only on DNS facilities is not reasonable or competitively neutral and nondiscriminatory management of the public rights of way. The Commission should also declare that local government requirements that seek to exercise unfettered discretion over whether a DNS network is deployed also have the effect of prohibiting telecommunications service and are not within local governments' Section 253(c) authority to manage the public rights of way. Further, the Commission should affirm that unreasonable delay is a prohibition of telecommunications service in violation of Section 253, in addition to violating Section 332(c)(7)(B)(ii). In so doing, the Commission should clarify that the maximum reasonable time for a local government to act on an application to install DNS facilities is 60 days, and that violation of that time limit requires the expedited grant of an injunction. Finally, the Commission should declare that municipal fees imposed on DNS facilities must be no more than the fees, if any, imposed on other equipment utilized by telecommunication companies for occupation of the public rights of way, depending on the amount of right of way actually occupied. Further, the Commission should declare that municipal fees are limited to recovery of the municipality's actual cost of managing the occupation of the public rights of way by the DNS facilities, based on the amount of public right of way occupied. The Commission should declare that fees cannot be based on the gross revenues of the provider.

A. Section 253 Preserves a Narrow Role for Local Governments to Regulate Use of Public Rights of Way

The United States Court of Appeals for the Third Circuit observed in 2002, that "Section 253 is quite inartfully drafted and has created a fair amount of confusion."[16] The Commission should take advantage of this opportunity and end this confusion by issuing a declaratory ruling that assures the removal of barriers to entry created by state and local government legal requirements and confirms that Congress intended to preserve only a limited and narrow role for local governments in regulating the public rights of way. Specifically, as the Commission established in one of the first Section 253 cases, that limited role for local government involved only classic safety and management type issues. Section 253(c) permits local governments to "manage the public rights of way," which means local governments may engage in:

- ***tasks necessary to preserve the physical integrity of streets and highways***,
- to control the orderly flow of vehicles and pedestrians,
- to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way
- coordination of construction schedules,
- determination of insurance, bonding and indemnity requirements,
- establishment and enforcement of building codes, and
- keeping track of various systems using the rights-of-way to prevent interference between them.[17]

Section 253, as a whole, must be analyzed with that understanding of the limited role that Congress intended for local governments. Structurally, subsection (a) broadly declares the general rule that "No State or local statute or regulation, or other State or local legal requirement,

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[16] *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002).

[17] *TCI Cablevision*, 12 FCC Rcd. at 21441 ¶ 103 (citations omitted); *see also TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 484 (N.D.N.Y. 2003) (management of rights-of-way means "control over the right-of-way itself, not control over companies with facilities in the right-of-way").

may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[18] Subsections (b) and (c) then exempt two kinds of regulatory actions from the broad sweep of subsection (a). States – but not local governments – are allowed under subsection (b) "to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[19] Then, under subsection (c), Congress allowed both State and local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[20]

The Commission and many federal courts have read subsections (a), (b) and (c) together to define the limits of local regulatory authority over telecommunications providers. Under that approach, local governments are preempted from regulating unless the requirement falls within the authority reserved in Section 253(c). Subsections (b) and (c) "define the boundaries of each bodys' regulatory authority: it suggests that *states* may regulate *broadly* with respect to public safety and welfare, service quality, and consumer protection, while *local governments*, in addition to any powers specifically delegated by the state, *have* ***narrower*** *residual authority to*

[18] 47 U.S.C. § 253(a).

[19] 47 U.S.C. § 253(b).

[20] 47 U.S.C. § 253(c). Subsection (d) specifies the Commission's obligation to exercise its preemption power if it "determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b)." Subsection (e) clarifies that nothing in Section 253 "shall affect the application of section 332(c)(3) of this title to commercial mobile service providers," and is addressed below in these comments. Subsection (f) preserves the ability of a State to enforce "eligible telecommunications carrier" requirements for rural service providers.

manage and demand compensation for the use of their rights of way."[21] Various courts have specifically applied this rationale to regulations imposing barriers to entry such as gross revenue fees.[22]

B. Courts Are Split In Applying Section 253(a) To Local Regulations That "Have The Effect Of Prohibiting" the Provision of Telecommunications Services

1. Early Decisions Under Section 253 Followed Congressional Intent

As early as 1997, in one of its initial opportunities to analyze Section 253, the FCC observed that "Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers," and expressed its concern that some "local governments may be creating an unnecessary 'third tier' of regulation that extends far beyond the statutorily protected interests in managing the public rights-of-way."[23] The Commission held that "[i]n evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, we consider whether it 'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[24]

In *Classic Telephone, Inc.*,[25] the Commission emphasized that with Section 253, Congress intended to eliminate impediments to deployment by *all* entities. The market, not local regulations, was to determine success in the marketplace:

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[21] *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 98 (1st Cir. 1999) (emphasis added).

[22] *See, e.g., Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006).

[23] *TCI Cablevision*, 12 FCC Rcd. at 21440-41 ¶¶ 102, 105 (internal quotation marks and citation omitted).

[24] *Id.* at 21439 ¶ 98 (quoting *California Payphone Ass'n*, 12 FCC Rcd. 14191, 14206 ¶ 31 (1997).

[25] 11 FCC Rcd. 13082 (1996).

> Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act that are intended to "remove not only statutory and regulatory impediments to competition, but *economic and operational impediments* as well." *Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers*, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.[26]

Likewise, in *TCI Cablevision*, the Commission reiterated that Section 253 was intended to limit the authority of local governments, and confirmed that, under a facial and as-applied challenge under Section 253(a), "[i]n evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, we consider whether it 'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[27] Requirements that "inhibit" or "limit" the telecommunications provider violate Section 253(a): they need not completely bar service in all scenarios.

In the *State of Minnesota* decision, the Commission held that Section 253(a) bars any state or local action that *impedes* competitors' use of any possible market entry methods.[28] Indeed, the Commission stated that "section 253(a) bars state or local requirements that ***restrict*** the means or facilities through which a party is able to provide service."[29] Again, the Commission did not require a complete barrier under all circumstances, but rather focused on any requirements that restrict the means or facilities for providing services.

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[26] *Id.* ¶ 25.

[27] *TCI Cablevision*, 12 FCC Rcd. at 21439 ¶¶ 98-99.

[28] *State of Minnesota*, 14 FCC Rcd. 21697, 21717 ¶ 38 (1999) ("*Minnesota Order*").

[29] *Id.* at 21708 ¶ 21 (emphasis added) (citing *Texas Preemption Order*, 13 FCC Rcd. 3460).

Moreover, in the *Minnesota Order*, in preempting an exclusive access grant to a single provider, the Commission rejected the State's arguments that other providers had alternative rights-of-way and routes available, stating that the existence of alternative public rights of way does not mean that the challenged regulation "does not have ***the potential to prevent*** certain carriers from providing facilities-based services."[30] The Commission found a 253(a) effective prohibition based on the potential impact of the agreement alone, not a showing of financial impossibility. Specifically, the Commission focused on the fact that alternative routes appeared to be more expensive and thus would impose a competitive disadvantage on those forced to use those routes.[31] Thus, the Commission found a requirement that imposed greater potential costs on one set of competitors compared to others violated Section 253.

Following the Commission's lead, federal courts interpreted Section 253(a) broadly to strike down various local regulatory regimes and requirements that, in context and taken as a whole, "materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." For example, in *AT&T Communications of the Southwest, Inc. v. City of Austin*, the court preempted local requirements including: an extensive approval process lasting up to six months, revenue-based franchise fees, detailed "financial and organizational materials" about the applicant, and other data that "either duplicat[ed] or exceed[ed] the information" required by the state utilities commission for state-wide authorization.[32] The court ruled based only on the face of the ordinance, and did not require the provider to demonstrate any actual prohibition of service.

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[30] *Id.* at 21709 ¶ 23 (emphasis added).

[31] *Id.* at 21713 ¶¶ 28-29.

[32] 975 F. Supp. 928, 934-35 (W.D. Tex. 1997).

In another early decision, *Bell Atlantic-Maryland, Inc. v. Prince George's County*, the court explained that municipalities "have a very limited and proscribed role in the regulation of telecommunications" and that "***local governments are prohibited by the [1996 Act] from exercising any regulatory powers over telecommunications companies beyond those listed in section 253(c)***."[33]

The court in *Prince George's County* found that the county's telecommunications ordinance "unquestionably has the effect of prohibiting the provision of telecommunications services by Bell Atlantic and other telecommunications companies."[34] Critically, the court observed that each challenged requirement, considered individually, might not constitute a barrier to entry, but viewed "*in combination*, they create a substantial and unlawful barrier to entry into the Prince George's County telecommunications market."[35] And although the court found that the County could lawfully require a telecommunications company to obtain a franchise, "the terms of any such franchise must be limited to the types of activities described by the FCC in *TCI Cablevision* and *Classic Telephone*."[36] Further, the court held that "[t]he County's decision to grant or deny a franchise . . . may only be conditioned on a telecommunications company's agreement to comply with the County's reasonable regulations

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[33] *Bell Atl.-Maryland, Inc. v. Prince George's Cty., Md.*, 49 F. Supp. 2d 805, 814 (D. Md. 1999) (emphasis added), *vacated sub nom. on other grounds,* 212 F.3d 863 (4th Cir. 2000) (citing and quoting *BellSouth Telecomms., Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1305 (S.D.Fla.1999); *In re Classic Tel.*, 11 FCC Rcd. 13082, ¶ 34; and *AT&T Commc'ns of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998), *vacated on other grounds*, 243 F.3d 928 (5th Cir. 2001)).

[34] *Id.* at 814.

[35] *Id.* at 814-15 (emphasis added).

[36] *Id.* at 816. As discussed below, *TCI Cablevision* and *Classic Telephone* articulated the limited scope of rights of way "management" under Section 253(c). Those cases made clear that Section 253(c) limits cities to traditional safety and construction coordination functions.

for managing the use of its rights-of-way."[37] The court went on to hold that each of the challenged provisions, and "any other provision of the ordinance that is not directly related to telecommunications companies' 'use of public rights-of-way,' as that phrase is herein defined, violates the [1996 Act]."[38]

2. The Ninth Circuit's *City of Auburn* Decision Correctly Defines the Permissible Scope of Municipal Regulation Under Section 253(a)

The majority of United States Courts of Appeals that have considered Section 253(a)'s scope likewise have applied Section 253(a) consistent with the Commission's approach and prior district court opinions.[39] The Ninth Circuit's decision in *City of Auburn v. Qwest Corp.* is particularly instructive and well-reasoned. In a challenge to similar ordinances enacted in eighteen communities, the court characterized the scope of Section 253(a):

> The preemption is virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. "Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications."[40]

Surveying cases interpreting Section 253, the court concluded that "a regulatory structure that allows a city to bar a telecommunications provider from operating in the city 'prohibit[s] or ha[s]

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[37] *Id.*at 816.

[38] *Id.* at 820.

[39] *See, e.g.*, *Cablevision of Boston*, 184 F.3d at 98; *RT Commc'ns*, 201 F.3d at 1268; *City of Auburn*, 260 F.3d 1160; *City of White Plains*, 305 F.3d at 77; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270. *But see TCG Detroit v. City of Dearborn*, 206 F. 3d 618, 624 (6th Cir. 2000) (rejecting claim that telecommunications ordinance, as a whole, effectively prohibited service).

[40] *City of Auburn*, 260 F.3d at 1175 (quoting *City of Dallas*, 8 F. Supp. 2d at 591).

the effect of prohibiting' the company's ability to provide telecommunications services under 47 U.S.C. § 253(a)."[41]

In its analysis, the court emphasized that the challenged ordinances "include ***several features that, in combination***, have the effect of prohibiting the provision of telecommunications services."[42] The court detailed the offending features of the ordinances and franchise agreements in question:

- "companies must submit a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items, and '[s]uch other and further information as may be requested by the City'";
- "two of the cities . . . require a public hearing before granting or revoking a franchise";
- Each ordinance "***authorizes the Cities to consider discretionary factors*** that have nothing to do with the management or use of the right-of-way";
- The ordinances "regulate transferability of ownership, even requiring franchises to report [on] stock sales";
- Some franchise agreements imposed fees that were "not based on the costs of maintaining the right of way, as required under the Telecom Act";
- "And, the ultimate cudgel is that each city reserves discretion to grant, deny, or revoke the franchises and the Cities may revoke the franchise if the terms in the ordinance are not followed, even allowing the Cities to remove the company's facilities"; and
- "Civil and criminal penalties are authorized as well."[43]

The court concluded that "***[t]aken together***, these requirements 'have the effect of prohibiting' Qwest and other companies from providing telecommunications services and create a substantial and unlawful barrier to entry into and participation in the . . . Cities' telecommunications

[41] *Id.* at 1176.

[42] *Id.* (emphasis added).

[43] *Id.* (emphasis added).

markets."[44] Recognizing that a sister circuit had "noted that a regulation that allows denial of a franchise does not alone constitute a prohibition within the meaning of Section 253(a)," the court emphasized that "our conclusion is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone."[45]

3. The Ninth Circuit Overruled *City of Auburn*, and Gutted the Scope of Section 253(a) by Requiring a Demonstration That "No Set of Circumstances" Exists Under Which Service Could Be Delivered Under the Challenged Regulation Service

The Ninth Circuit's articulation of the scope of Section 253(a) preemption in *City of Auburn* was approved by other circuit courts and numerous district courts.[46] Subsequently, however, some courts questioned the breadth of preemption articulated by the *City of Auburn* decision. In *Level 3 Communications v. City of St. Louis*, the Eighth Circuit grouped *City of Auburn* with decisions it characterized as suggesting "that *possible* prohibition will suffice" to establish a violation of Section 253(a), despite the Ninth Circuit's express statement that its decision did not rest upon the "mere possibility" of denial.[47] Finally, in *Sprint Telephony PCS, L.P. v. Sprint*, an *en banc* panel of the Ninth Circuit overruled *City of Auburn*, stating it joined "the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition'."[48]

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[44] *Id.* (emphasis added).

[45] *Id.* at n.11.

[46] *See, e.g.*, *City of White Plains*, 305 F.3d at 76; *City of Santa Fe*, 380 F.3d at 1270; *see also Puerto Rico Tel.*, 450 F.3d at 18 (relying on *City of White Plains* and *City of Santa Fe* for scope of Section 253(a) prohibition); *New Jersey Payphone*, 299 F.3d at 247 (declining to rule on franchise selection criteria but noting "that several of the criteria which the Town would apply have been rejected in connection with non-exclusive franchise schemes considered by other jurisdictions) (citing *City of Auburn*).

[47] 477 F.3d 528, 532-33 (8th Cir. 2007) (emphasis in original).

[48] 543 F.3d 571, 578 (9th Cir. 2008) (quoting *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d at 532-33).

In place of the *City of Auburn* standard that built on the Commission's analysis of Section 253, the *Sprint* panel radically departed from prior authorities to create a new standard for facial challenges to local regulations under Section 253(a), holding that "a challenger must establish that no set of circumstances exists under which the [challenged regulation] would be valid."[49] The panel adopted the "no set of circumstances" test from cases that predate the 1996 Act and consider facial constitutional challenges, not express preemption under an act of Congress.[50] These cases have no relevance to telecommunications law or markets, or to statutes with express federal preemption like that in section 253. Congress and this Commission plainly did not intend to limit the scope of Section 253(a) to such extreme regulations. Although the *Sprint* panel stated that its "interpretation is consistent with the FCC's,"[51] that statement is demonstrably wrong. The decision guts the Commission's prior interpretations of Section 253(a).

4. The Commission Should Declare that *City of Auburn* States the Correct Standard for Analysis of Section 253(a)'s "Effective Prohibition" Clause

The Ninth Circuit's requirement that a provider demonstrate that there is "no set of circumstances" under which a challenged regulation would allow services directly contradicts the Commission's longstanding interpretation of Section 253. The *Sprint* standard would allow many local regulations that "materially inhibit or limit the ability" of a provider "to compete in a fair and balanced legal and regulatory environment" to nonetheless survive a Section 253 challenge. Local regulations that interfere with a provider's ability to compete fairly could, theoretically, be overcome so the provider could enter the market and compete – albeit hindered

[49] *Id.* at 579 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

[50] *See id.* (quoting *Salerno*, 481 U.S. at 745 and *id.* n.3 (quoting *Hotel & Motel Ass'n v. City of Oakland*, 344 F.3d 959 (9th Cir. 2003), and *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995)).

[51] *Id.* at 578.

in that competition by the regulations. Likewise, a provider who could show that a local regulation interferes with its ability to compete in a fair and balanced legal and regulatory environment may not be able to demonstrate that there is no set of circumstances under which the regulation is valid.

Fundamentally, the Ninth Circuit's *Sprint* decision has flipped the intent of Congress on its head. Under *Sprint,* local governments are free to impose all manner of entry barriers and regulations, wholly unrelated to fundamental management of the public rights of way. So long as they do not prohibit telecommunications services under all possible circumstances, local governments are allowed to act as gatekeepers to competition, imposing regulations on certain technologies and new entrants that skew competition and the market. It is a situation diametrically opposed to the intent of the 1996 Act, and one that contradicts the language of the statute. As discussed above, local governments were reserved the authority only to govern physical integrity of the streets and safety of installation – not to exercise vast discretion over technology and business choices.

Accordingly, the Commission should take this opportunity to declare that the Ninth Circuit's decision in *City of Auburn* correctly states and applies the standard for determination of whether a challenged regulation has the effect of prohibiting a provider's delivery of service under Section 253(a) and Section 253(c), and declare that the "no set of circumstances" test articulated in *Sprint* is incorrect, contravenes Congressional intent, and should not be employed by the courts.

C. Section 253 Prohibits Local Regulation of DNS Deployment That Do Not Directly Manage the Public Rights of Way

The Commission should rectify the suppression of competition wrought by *Sprint* by confirming that the scope of permissible local regulation of DNS network providers under

Section 253 is limited to those regulations necessary to manage the physical occupation of the rights of way. The Commission should confirm that the *City of Auburn* court was correct when it said:

> The preemption is virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. "Municipalities therefore have a ***very limited and proscribed role*** in the regulation of telecommunications."[52]

Specifically, as the Commission established in *TCI Cablevision*, and followed by many courts, that limited role for local governments means "preserv[ing] the physical integrity of streets and highways," controlling the orderly flow of vehicles and pedestrians, and keeping track of various systems using the rights-of-way to prevent interference between them.[53]

Local regulations, including zoning processes, effectively block the construction of additional distributed network and small cell facilities, sometimes permanently, but always for the duration of the process. As the Commission recognizes, DNS facilities "must be deployed more densely – *i.e.*, in many more locations – to function effectively."[54] Any local regulation that precludes the necessary density of construction for DNS networks to function properly constitutes a barrier to entry in violation of Section 253(a). ExteNet's experience is that zoning proceedings routinely last many months, often exceeding one year. Other local processes may

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[52] *City of Auburn*, 260 F.3d at 1175 (emphasis added) (citation omitted).

[53] *TCI Cablevision*, 12 FCC Rcd. at 21441 ¶ 103 (citations omitted); *see also Town of Colonie*, 263 F. Supp. 2d at 484 (management of rights-of-way means "control over the right-of-way itself, not control over companies with facilities in the right-of-way"); *City of Dallas*, 8 F. Supp. 2d at 591-92 ("These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.").

[54] *Public Notice*, 31 FCC Rcd. at 13360.

not include formal zoning, but nevertheless take months for ExteNet to exchange all of the requested information with the local officials, modify its plans, and often re-submit after the officials comment on ExteNet's initial proposal. At the end of the process, the local government might not approve the request for the installation at all based solely on discretionary standards, and as a result, ExteNet is flatly prohibited from providing service to the intended jurisdiction. Even if approval is ultimately granted, ExteNet is effectively prohibited from providing service during the proceeding and until the final design is approved and construction can begin. The Commission should confirm that such local proceedings, with their burdensome processes and unfettered discretion, "have the effect of prohibiting" ExteNet from providing service, and violate Section 253(a)'s prohibition.

1. Section 253(c) Reserves Limited Authority

A critical element of defining the scope of local regulation is the limited "management" function reserved in Section 253(c). Section 253(c) allows local governments to continue regulating the use of the public rights of way by DNS networks, and other telecommunications users of the rights of way. However, that is not a broad sweeping authority to regulate anything that will be located in the public rights of way. As *City of Auburn* recognized, the argument advanced by many cities that the fact that the facility will occupy the right of way means any regulation may be imposed on that facility is a "semantic two-step" under which "the safe harbor provisions would swallow whole the broad congressional preemption."[55] Rather, the Commission and courts have articulated the types of right of way management activities – focused on physical occupation – that are permissible under Section 253(c). Specifically, the regulations that fall within Section 253(c) have been described as including:

[55] *City of Auburn*, 260 F.3d at 1180.

- coordination of construction schedules,
- determination of insurance, bonding and indemnity requirements,
- establishment and enforcement of building codes, and
- keeping track of the various systems using the rights-of-way to prevent interference between them.[56]

Under this standard, a local government will be able to do everything necessary to fulfill its obligation as steward of the public rights of way. But under this definition of the authority reserved to local governments, local governments cannot require DNS providers to undergo discretionary processes, such as zoning, that focus on aesthetics rather than physical interference and safety, and ultimately give the cities discretion over whether facilities can be deployed. Specific requirements that clearly are not reasonable management of the public rights of way include, for example: minimum distances from residential buildings; minimum distances (e.g., 300 or 500 feet) between small cell antennas; arbitrary limitations on equipment dimensions (equipment should be permitted if the pole is structurally capable of safely supporting the attachment); and screening and camouflage requirements. The Commission should declare this to be the correct standard nationwide.

D. Local Requirements Imposed On DNS Providers But Not Other Users of the Utility Space in Public Rights of Way Violate Section 253(a) and Are Not Saved By Section 253(c)

Even though, as the Commission recognizes, DNS facilities are small, and typically are deployed on existing poles and lighting structures, ExteNet's experience is that many communities impose on ExteNet requirements, including zoning or other similar discretionary review, that are not imposed on other users of the public rights of way. Traditional wireline telecommunications providers, cable operators, and electric utilities normally do not need to go through zoning. Those entities normally work with the municipal public works and permitting

[56] *Id.* at 1177 (quoting *TCI Cablevision*, 12 FCC Rcd. at 21441 ¶ 103); *see also, e.g.*, *Town of Colonie*, 263 F. Supp. 2d at 484; *City of Dallas*, 8 F. Supp. 2d at 591-92.

departments to coordinate construction, provide proof of insurance, and otherwise allow the locality to manage its public rights of way. The process for those companies is ministerial, takes only days or a few weeks at most, and costs a small fraction of the expense of going through zoning review. Yet, local governments regularly require ExteNet's DNS facilities to comply with zoning and other requirements other than standard rights of way permitting. ExteNet regularly encounters requirements that are imposed on the fiber optic portions of its DNS network that would not be imposed in the same city if the fiber were not associated with a wireless element. The local governments are singling out all elements of ExteNet's DNS networks simply because of the relation to wireless.

As the Commission observed in *TCI Cablevision*,

> An especially troubling issue alluded to in the record concerns the discriminatory application of telecommunications regulation, whether at the state or local level.
> . . .
> One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.[57]

Zoning regulations imposed on only DNS providers, but not other users of the public rights of way utility corridors, preclude providers, such as ExteNet, from "competing in a fair and balanced legal and regulatory environment," and therefore constitute an effective prohibition of service under Section 253(a). It is axiomatic that imposing a set of requirements on one telecommunications provider and not others that use the same utility poles in the public rights of

[57] *TCI Cablevision*, 12 FCC Rcd. at 21442-43 ¶¶ 107-108.

way is also not "competitively neutral and nondiscriminatory," as required by Section 253(c).[58] The Commission should affirm this principle.

Fundamentally, those communities are discriminating in favor of one telecommunications technology – wireline – against companies that use wireless technology to compete.[59] Yet, as the Commission and multiple courts have recognized, the 1996 Act was intended to promote competitive technologies and prevent local governments from influencing market entry and success. The Commission should act now to stop this most obvious and fundamental barrier to deployment of wireless telecommunications in the public rights of way.

Indeed, the Commission has previously concluded that costs imposed only on new entrants are classic barriers to entry.[60] In a 1994 order implementing the 1992 Cable Act, the Commission defined a barrier to entry as "'a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.'"[61] And the Ninth Circuit has held that "The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier."[62] In its *Amicus Curiae* brief in *City of White Plains*, the Commission asserted that "[d]iscriminatory entry conditions . . . make

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[58] *See, e.g., White Plains*, 305 F.3d at 79.

[59] And there can be no dispute that wireless technologies and services compete directly with wireline. The most recent government report shows that nearly 50% percent of all U.S. households have cut the cord, using wireless technology for telecommunications service with no wireline service. Stephpen J. Blumberg and Julian V. Luke, National Center for Health Statistics, "Wireless substitution: Early release of estimates from the National Health Interview Survey, January–June 2016," (Dec. 2016), http://www.cdc.gov/nchs/nhis.htm.

[60] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, Appendix H at 7621-22 ¶ 29 (1994).

[61] *Id.* (quoting G. Stigler, The Organization of Industry 67 (1968)).

[62] *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 (9th Cir. 1993); *see also, e.g., Montgomery Cty. v. Metromedia Fiber Network, Inc*., 326 B.R. 483, 494 (S.D.N.Y. 2005), *vacated and remanded pursuant to joint motion* (05-4123) (Aug. 31, 2006).

competitive entry more difficult and unlikely, thereby undermining the local competition Congress sought to foster."[63]

The Commission could achieve significant competitive balance for ExteNet and the wireless infrastructure industry by declaring that local governments cannot lawfully impose regulations on small cells in the public rights of way when such regulations are not also imposed on all other telecommunications providers that install facilities on poles in the rights of way. In particular, the Commission should explicitly declare that Section 253 prohibits local governments from discriminating against wireless infrastructure equipment, and reject the theory that such discrimination is acceptable if the city regulates all "wireless" installations the same. Such arguments that treating one group of providers the same satisfies Section 253 have been rejected repeatedly by the Commission and the courts.[64]

E. A Local Process That Exceeds 60 Days Constitutes Unreasonable Delay in Violation of Section 253

The Commission and courts have recognized that unreasonable delay constitutes a violation of Section 253(a). As the Commission explained in *Classic Telephone*:

> If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority. . . . More specifically, in certain circumstances a failure by a local government to process a franchise application in due course may "have the effect of

[63] Brief for Federal Communications Commission and the United States as Amici Curiae, *TCG N.Y., Inc. v. City of White Plains*, No. 01-7213, 2001 WL 34355501, at *8 (2d Cir. filed June 13, 2001).

[64] *RT Commc'ns*, 201 F.3d at 1269 (rejecting argument that regulation was "competitively neutral" because it treated all *new* entrants the same) (emphasis added); *TCI Cablevision*, 12 FCC Rcd. at 21443 ¶ 108 ("Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.").

> prohibiting" the ability of the applicant to provide telecommunications service, in contravention of section 253.[65]

In *City of White Plains*, the Second Circuit noted that, in addition to other effective prohibitions, "the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays."[66] One lower court noted that "[i]t goes without saying that delayed entry into the local telephone service market can have profound effects on the success of AT & T's venture, particularly against a competitor as well-entrenched as [the incumbent provider] SWBT."[67]

ExteNet has faced immense delays on a constant basis in its efforts to obtain local approvals for the installation of its facilities in the public rights of way. Delays of more than a year are common, and delays of six to twelve months are routine. The Commission should "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services"[68] by declaring that a delay of more than 60 days for processing of permits for the installation of DNS facilities within public rights of way constitutes an effective prohibition of service.

As a threshold matter, it is important to put this issue into perspective. The typical time for a local government to review and grant an application to deploy a fiber optic based CLEC network in the public rights of way is just a matter of a few days or possibly a few weeks. There is no element of aesthetic review, zoning, or other time-consuming evaluation. Indeed, such right of way permits are typically granted on an administrative, ministerial basis.

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[65] *Classic Tel.*, 12 FCC Rcd. at 15634 ¶ 28; *see also TCI Cablevision*, 12 FCC Rcd. at 21441 ¶ 105 ("unnecessary delays" caused by local governments are a concern under Section 253).

[66] *City of White Plains*, 305 F.3d at 76.

[67] *City of Austin*, 975 F. Supp. at 938.

[68] *Texas Preemption Order*, 13 FCC Rcd. at 3461 ¶ 1 (quoting S. Rep. No. 104-230, at 1 (Conf. Rep.)).

ExteNet's DNS equipment is essentially identical in size and appearance to the other communications and utility equipment that is deployed in the public rights of way on poles, and in some cases smaller. The equipment comprising a typical node in ExteNet's network includes a small, low-power antenna, remote radio equipment and optical conversion hardware for the conversion of RF signals to optical signals (and *vice versa*), that is connected to the antenna, fiber optic lines, and associated equipment such as power supplies. The equipment configurations in ExteNet's DNS node locations are very similar in size to the equipment deployed by other telecommunications and cable television companies. The equipment enclosures typically used by ExteNet are essentially the same size as the fiber and customer interface equipment deployed on poles by incumbent wireline local exchange carriers. They are also very similar to the equipment enclosures deployed on poles by cable television operators. At the same time, ExteNet's equipment is frequently smaller than many of the large equipment installations deployed on poles by electric utilities, such as transformers and cross arms.

Thus, the size and appearance of DNS equipment is no different than the equipment already deployed on utility poles throughout the public rights-of-way, and there is no basis for local authorities to claim that review of small cell deployments requires lengthy and burdensome applications and reviews.[69]

A declaration that 60 days is the maximum reasonable time for a local government to act on a DNS application is consistent with the Commission's holding in its *2014 Wireless*

[69] Wireline applications are processed in a matter of a few days, or a few weeks at most, with dozens or hundreds of poles. An application for a DNS that may involve tens of small cell nodes could also be easily reviewed within a matter of days, or a few weeks at most, so long as the local government applies the same standards it does for non-wireless equipment on the same poles. Accordingly, the Commission should confirm that "batching" of multiple DNS installations into a single application is permitted and may not be the basis for the locality to take a longer time for processing.

Infrastructure Order. Although a new DNS installation on an existing utility pole is not an "eligible facility request," it is fundamentally similar to a collocation under Section 6409 of the Spectrum Act,[70] an application for which a municipality would have 60 days to act or otherwise be deemed to have approved the application. In both cases, the largest intrusion into the right of way is the utility pole, which is already in place and has already been approved for telecommunications and utility attachments. There is nothing about the DNS attachment that warrants special treatment – except the emission of radio frequencies, and Congress has clearly prohibited cities from regulating based on concerns about RF.[71] Indeed, in the *2014 Wireless Infrastructure Order*, the Commission repeatedly recognized that DNS equipment can be installed "with little or no impact" on utility poles.[72] Given these acknowledgements, the Commission should declare that, for DNS installations on existing utility poles in public rights of way, the maximum reasonable time for action on an application is 60 days.

F. Local Fees For DNS Use Of Public Rights Of Way Violate Section 253 Unless They Are (i) Publicly Disclosed In Advance, (ii) No Greater Than Fees Charged To Other Users, And (iii) No More Than the Locality's Direct Costs Incurred Managing the Provider's Use of Public Rights Of Way

Section 253(c) allows local governments "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." To resolve the ambiguity caused by disparate court treatment, the Commission should declare that Section 253(c) allows local governments to recover only their actual costs of managing the use of the public rights of way. The Commission

[70] *See* Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (codified at 47 U.S.C. § 1455(a)).

[71] 47 U.S.C. § 332(c)(7)(B)(iv).

[72] *2014 Wireless Infrastructure Order*, 29 FCC Rcd. at 12866-67 ¶ 3, 12907 ¶ 91.

should affirm that the fees cannot be based on the revenues of the provider or private real estate values in the area and that the fees imposed on DNS facilities must not be more than those imposed on other telecommunications facilities.

As a threshold matter, there can be no disagreement that the statute expressly requires any fees or charges for use of the rights of way to be disclosed in advance, and to be competitively neutral and nondiscriminatory. Yet, ExteNet has had difficulty learning what certain local fees are going to be in advance, and others are offered as only an initial rate, potentially to be raised in the future. To that end, the Commission should declare that all such local fees for use of the rights of way by DNS providers must be disclosed in advance, upon request.

Moreover, fees cannot be discriminatory in relation to other telecommunications users of the rights of way. If, for example, wireline telecommunications service providers pay nothing but a one-time permit fee, DNS providers should not pay annual fees, higher application fees, or fees based on factors other than those used to set permit fees for wireline providers.

Additionally, the fees must be based on the locality's costs of regulating the rights of way in order to be "fair and reasonable." As the court in *Prince George's County* explained in striking down franchise fees based on a percentage of the providers' gross revenues:

> The crucial point, however, is that any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a). For the same reason, the court also believes that local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. Franchise fees thus may not serve as general revenue-raising measures.

> . . . If local governments were permitted under section 253(c) to charge franchise fees that were unrelated either to a telecommunications company's use of the public rights-of-ways or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the FTA's pro-competition mandate and make a nullity out of section 253(a). Congress could not have intended such a result.[73]

The court in *Prince George's County* had it right: fees unrelated to the local government's costs of regulation, or the extent of the provider's use of the rights of way, constitute an economic barrier to the provision of service that are by definition unreasonable and unfair. As another court reasoned, "a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry."[74] This line of reasoning comports with the Commission's prior determination that a fee based on the value of exclusive use of the rights of way did not appear to be "fair and reasonable."[75]

The fundamental problem with fees based on a percentage of revenue, the length of fiber installed, "property values," or any other formula other than the regulator's costs of managing the rights of way is that there is no effective substitute for the public rights of way. There is no free market to discipline the rates demanded by local governments from DNS providers for the use of the rights of way. For the same reasons that wireline networks, cable operators, and electric companies all use the public rights of way as a dedicated corridor for common use, DNS providers should and must use the public rights of way. The Commission should, therefore, confirm that local fees and charges other than those based on the locality's costs of managing the rights of way violate Section 253(a) and are not saved by Section 253(c).

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[73] *Prince George's County*, 49 F. Supp. 2d at 817 (internal citations omitted).

[74] *XO Mo. v. City of Md. Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003); *see also Puerto Rico Tel.*, 450 F.3d at 22 ("[a]bsent evidence of costs, the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing.").

[75] *Minnesota Order*, 14 FCC Rcd. 21697, 21729-30 ¶ 62.

G. The Commission Should Clarify that Section 253 Applies To DNS Deployment In Public Rights Of Way And That The Standard Under Section 253 Is Not The Same As Section 332(c)(7)(B)

1. Section 253 Is Applicable

The Commission should clarify that Section 253 is relevant and applicable to deployment of DNS in the public rights of way, and that the relevant standard is not the same as the judicially-crafted standard currently applicable under Section 332(c)(7)(B).

First, Section 253 is applicable to the deployment of DNS and other wireless facilities in the public rights of way. Section 253(a) expressly preempts any local government requirement that has the effect of prohibiting "***any*** entity to provide ***any*** interstate or intrastate telecommunications service."[76] As the Supreme Court has recognized, the provision of telecommunications services even via wireless technologies is still "telecommunications service."[77] As a result, Section 253(a) applies to the deployment of telecommunications services that use wireless facilities.

Courts have rejected the repeated arguments of local governments that Section 332(c)(7) governs local regulation of the deployment of personal wireless services facilities to the exclusion of Section 253. Section 332(c)(7) is a vehicle for appealing the denial of specific, individual zoning applications, but Section 253 is the appropriate provision for challenges to the fundamental requirements imposed by local government. Section 253 "provides a cause of action against *local regulations*," while Section 332(c)(7) "gives a cause of action against *local*

[76] 47 U.S.C. § 253(a) (emphasis added).

[77] *National Cable & Telecomms. Ass'n v. Gulf Power Co*. 534 U.S. 327, 340-42 (2002).

decisions."[78] Thus, Section 332 would apply *if* a provider has applied for a specific zoning approval and been denied.

Some cities have even argued that their local zoning regulations are immune from Section 253 scrutiny. But that position has been explicitly rejected.[79] There is no basis for the argument that Congress left local zoning untouched and without limits. The Commission in this situation is addressing the fundamental requirements and authority of local governments. Thus, Section 253 is the appropriate statutory provision.

a. The Standard Under Section 253(a) Is Not The Same As Under Section 332(c)(7)(B)(i)(II)

The Commission should also establish that the standard for an "effective prohibition" of personal wireless service in the context of the denial of a single wireless tower application under Section 332(c)(7)(B)(i)(II) is not the same as the analysis of municipal requirements, generally, under Section 253 as applied to DNS in the public rights of way. The Ninth Circuit in *Sprint* mistakenly asserted that the standard for an effective prohibition of personal wireless service under Section 332(c)(7)(B)(i)(II) is the same as the standard for claims of effective prohibition under Section 253(a).[80] Indeed, the Commission appears to have confused the issue somewhat in

[78] *Cox Commc'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *see also USCOC of Greater Mo., L.L.C. v. Vill. of Marlborough*, 618 F. Supp. 2d 1055, 1065 (E.D. Mo. 2009).

[79] *See, e.g., Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1335-39 (D.N.M. 2007) (rejecting city's argument that local zoning regulations are immune from Section 253 challenge); *see also GTE Mobilnet of Cal. Ltd. P'ship v. City & Cty. of San Francisco*, 2007 WL 420089, at *3-7 (N.D. Cal. Feb. 6, 2007) (granting summary judgment on facial challenge to city's wireless ordinance under Section 253).

[80] *Sprint*, 543 F.3d at 579.

questions raised in the *Public Notice*.[81] The Commission should clarify that the Sections are different, as are their standards.

The emphasis on analysis of "alternatives" in the Section 332(c)(7) "effective prohibition" cases has been rejected by the Commission under Section 253. The First Circuit has required the plaintiff in a Section 332 effective prohibition case to show that there is "no feasible alternative" to the proposed facility.[82] Yet, the Commission and various courts have rejected the argument that Section 253(a) requires a showing that the challenged requirement is insurmountable (*i.e.*, that the provider has alternatives). In the *Minnesota Order*, the Commission explicitly rejected the argument that the availability of alternative rights of way (*i.e.* theoretically feasible alternatives) meant that the state's requirement did not effectively prohibit service in violation of Section 253(a).[83] As demonstrated above, the Commission and courts have repeatedly recognized that local requirements violate Section 253(a) when they that impose greater expense or burden.

A standard that would require ExteNet and other DNS providers to demonstrate that there are no alternatives is nonsensical in the public rights of way context. It would be impossible for a purely wireline-based deployment to meet that standard – and no court has ever suggested that Section 253 requires any such showing. The standard is a judicial creation in the context of traditional tall towers on private property where one antenna can serve a large area. The area covered by the average DNS antenna is only a few hundred feet.[84] The Commission should stop

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[81] *Public Notice*, 31 FCC Rcd. at 13365-66.

[82] *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 50 (1st Cir. 2009).

[83] *Minnesota Order*, 14 FCC Rcd. at 21709-10 ¶ 23.

[84] *See, e.g., Public Notice* at n.17 (recognizing the limited coverage of small cells).

this illogical imposition of a macro tower standard onto DNS facilities in the public right of way purely because both involve an antenna.

Finally, a standard that would effectively allow local governments to deny DNS deployment in the public rights of way on the theory that some other "alternative" exists would allow those local governments to choose which technologies and services it will allow. Indeed, such a standard would be accepting the all too common, but fundamentally meritless, argument that wireless facilities belong on private property. The 1996 Act and Section 253 were adopted specifically to deprive local governments of the role of choosing what technologies to allow in the public rights of way or in general. Under the Act, the market and technological innovation were to control market entry.

IV. CONCLUSION

The deployment of wireless networks and services is a critical element of the present and future economy, as the Commission has recognized. But, as ExteNet's experience too often confirms, the deregulatory, procompetitive intention of the 1996 Act is being thwarted by an inconsistent and burdensome patchwork of local regulations. Accordingly, the Commission should take this opportunity to issue a declaratory ruling that will clarify the original intent of Congress, clarify what constitutes DNS, and clarify the correct meaning and application of Section 253.

Respectfully submitted,

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